SUPREME COURT, U. S.
JAN 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 75-543

74-543

BRIDGEPORT GUARDIANS, INC., ET AL

VS.

MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION, ET AL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 497 F. 2d 1113 and is reprinted in Petitioners' Appendix pp. 14a-18a. The opinion of the District Court is not reported, but is reprinted in 8 EPD ¶ 9508 and is set out in Petitioners' Appendix pp. 1a-13a.

JURISDICTION

The Courts jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

It is mandatory that the Federal Courts must use the theory of a private Attorney General when deciding whether to award attorney fees in a class action Section 1981 and 1983, 42 United States Code case, or may the Federal Courts exercise discretion depending upon the facts of the case?

STATUTORY PROVISIONS INVOLVED

Section 1981, 42 United States Code:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1983, 42 United States Code:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress.

STATEMENT

Petitioners commenced action pursuant to 42 U.S.C. 44 1981 and 1983 to challenge the hiring and promotion procedures of the Bridgeport, Connecticut, Police Department. Plaintiffs in addition to being members of the Police Department were also members of the Black and Puerto Rican community. The plaintiffs prevailed concerning the entering level but were reversed as to remedy involving promotions. After two years, the plaintiffs did not win the litigation which they sought, but rather a major portion of their litigation was reversed by the Court of Appeals for the Second Circuit.

The District Court denied the award of attorney fees. The Court was well within its discretion in denying costs because the District Court was aware of the role of all of the parties in the attempted settlement of the case. It was only when the settlement discussions broke down neither of the parties were agreeable to a result similar to the final result that the entire litigation continued. In addition, most of the parties who had an interest in becoming members of the force were represented by Ira Horowitz who is with the Bridgeport Legal Services.

ARGUMENT

Petitioners contention that the issue involved is whether Federal Courts have the authority, in the absence of express statutory authorization, to award attorney fees to a successful plaintiff who acts as a private attorney general in enforcing important public policies is not the facts of the present case. Judge Newman did not decide that the plaintiffs' attorneys were acting as private attorney generals. And even if the Judge would have, he still has an option as to awarding attorney fees. The law is clear on this point.

"Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers may award attorneys' fees when the interest of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery."

Thus it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly or for oppressive reasons." In this class of cases, the underlying rationale of "fee-shifting" is of course punitive, and the essential elements in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant."

Hall v. Cole, 93 S.Ct. 1943, 1945, 1946.

Although the award of attorney fees is restricted to exceptional cases another standard for awarding attorney fees is whether bringing the suit was unnecessary and was compelled by the defendants "unreasonable, obdurate, obstinancy". This does not mean that if a defendant decides to resist a claim of discrimination in every case, that he is unreasonable or obstinate.

Stolberg v. Trustees for State Colleges of Connecticut, 474 F.2nd 485, 490.

Mere fact that a defendant is unsuccessful will not justify an award of attorney fees.

Diamond Shamrock Corp. v. Lumbermen's Mutual Gas Co., 406, F.2nd 722.

If awards of attorney fees are to be made to promote public policy expressed in legislative action, they should be authorized by Congress and not by the Court. Counsel fees are not ordinarily recoverable in absence of statutory or contractual authority and only in exceptional cases. Even in cases whereby statute attorney fees are permitted in special circumstances the courts have the discretion of not making any award.

Northcross v. Board of Ed. of Memphis City Schools, 93 S.Ct. 2202.

Congress has not seen fit to pass any legislation making an award of attorney fees permissible in any case brought under 42 U.S.C.A. 1983 and, therefore, the court could only award attorney fees in a very exceptional case in the discretion of the court.

Some courts in their discretion in awarding attorney fees have adopted what is referred to as "private attorney general theory". The rationale for making these awards is that its effect will be to encourage litigants to vindicate public rights without concern for the considerable financial burden of legal fees. In this case, the court merely stated that awarding attorney fees was not mandatory in every case brought under the concept of private attorney general. The award of attorney fees is always discretionary. To be otherwise, might be dangerous. The chief rationale behind the traditional American rule that bars the award of fees to successful litigants, is the fear that parties might be unjustly discouraged from instituting or defending actions to vindicate their rights if the penalty for losing in court would always include fees for the opponents' counsel.

Wilderness Society v. Morton, 42 L.W. 2526.

The private attorney general theory is not rejected by our Circuit. The Guardians' decision stands for the proposition that: "While the concept of private attorney generals is an important one, engulfing it on Sec. 1983 so as to make attorneys' fees "ordinarily" recoverable, **Newman v. Piggie Park Enterprises, Inc.**, supra 390 U.S. 402, would amount to a judicial amendment of Sec. 1983 with a provision Congress has thus far not placed there."

> See Memorandum of Decision of District Court, pet. 10a-11a.

Kirkland v. New York State Dept. of Correctional Service, 374 F. Supp. 1361, 1381-82 (1974) a Second Circuit case applied the private attorney general theory in awarding attorney fees in a similar suit but significantly a subsequent case and one in which the plaintiffs were totally successful. It is also significant to note that the petitioners' attorney, Jack Greenberg, handled the Kirkland case and should be aware that the Second Circuit applied the private attorney general theory when it so sees fit. Judge Newman decided that under the circumstances of the Bridgeport Guardian case, it would be unjust to award attorney fees or apply the private attorney general theory.

> See Memorandum of Decision of District Court, pet. 10a-12a.

The District Court was well within its discretion in denying costs because the District Court was aware of the role of the parties in the attempted settlement of the case. It was only when the settlement discussions broke down that neither of the parties were agreeable to a

result similar to the final result that the entire litigation continued. "The trial judge was fully aware of all of the facets of this case, the contribution made by counsel for plaintiffs, as well as the reasonableness of the resistance to the plaintiffs' claim by the defendants. We do not find any abuse of discretion."

> Opinion of the Court of Appeals, pet. 18a.

> "The award of attorneys' fees to a prevailing party in these situations is an exercise of the general equity jurisdiction of the federal courts."

> **Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.**, 62 F.R.D. 353, 354 (1974)

The plaintiffs did not win the litigation which they sought, but rather a major portion of their litigation was reversed by the Court of Appeals for the Second Circuit. "Since there is no statutory provision for attorneys' fees under 42 U.S.C. Sec. 1983, attorneys' fees should be allowed only when the public policy would require it."

> **Knight v. Auciello**, 453 F. 2d 582, First Circuit (1972), cited in **Northcross v. Board of Education**, 412, U.S. 427, 93 S.Ct. 2201, 37 L. Ed 2d 43, 51 n.2 (1973).

The court should consider the degree to which a public right is asserted by plaintiff and the extent to which defendant has engaged in deliberate wrongdoing.

> Id; **Lee v. Southern Home Sites Corp.**, 444 F.2d 143 5th Circuit (1971).

In this case, defendants have not deliberately embarked on a course of discrimination and at least with respect to racial discrimination have, in fact, prevailed in their defense against one of the plaintiffs claims. In the exercise of its discretion, the Court declines to award attorneys' fees to plaintiffs.

Smith v. City of East Cleveland, 363 F. Supp. 1131 (1973).

The award of attorneys' fees is discretionary, not mandatory.

> "The allowance of such fees is within the discretion of the district court and its exercise of this discretion would not be upset on appeal in the absence of clear abuse."

Jinks v. Mays, 464 F2d 1223, 1228 (1972).

There is no real conflict between Circuits as to principle on the issue of attorney fees only as to decisions. Therefore, if the jurisdiction of the Supreme Court were granted to review this case by Writ of Certiorari, the Court would be giving the defeated party in the Circuit Court of Appeals another hearing.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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Bridgeport Civil Service Commission

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